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IN THE
COURT OF APPEALS OF INDIANA

IN THE MARRIAGE OF:	)	
	)	
JAMES J. BLAISING,	)	
	)	
AND	)	
	)	
NIKKI J. BLAISING,	)	No. 02A03-0612-CV-613
	)	
Appellant-Respondent,	)	
	)	
vs.	)	
	)	
BONNIE L. BLAISING AND WILLIAM R. BLAISING	)	
	)	
Intervenors-Appellees.	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas L. Felts, Judge
Cause No. 02C01-0208-DR-664

May 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, Nikki J. Blaising (Mother), appeals the trial court's Child Custody Modification Order awarding legal custody over the minor child, A.B., jointly to Mother and Intervenors-Appellees, Bonnie L. Blaising (Grandmother) and William R. Blaising (Grandfather) (collectively, the Grandparents).

We affirm.

ISSUE

Mother raises one issues on appeal which we restate as follows: Whether the trial court properly granted joint legal custody of A.B. to Mother and the Grandparents, with primary physical custody retained by the Grandparents.

FACTS AND PROCEDURAL HISTORY

James Blaising and Mother were married on April 29, 1999. At the time of the marriage, James was 19 years old and Mother was 17 years old. Two children were born of the marriage: S.B., born on November 29, 1999 and A.B., born on February 25, 2002. In May of 2002, James and Mother separated, with James filing a Petition for Dissolution on September 5, 2002. On the same day, the Grandparents, James' parents, filed a Motion to Intervene in the dissolution proceedings.

On January 30, 2003, the Allen Circuit Court entered a Decree of Dissolution of Marriage which incorporated a settlement agreement entered into between James and

Mother. In the Decree, the trial court awarded custody of the minor children to the Grandparents, pursuant to the terms of the settlement agreement, and ordered James and Mother to pay child support.

On February 27, 2004, S.B. died as a result of an unfortunate drowning accident while in James' temporary care. The Indiana Department of Child Services conducted a full investigation of the incident, and concluded that Mother's reported allegations of child neglect were unsubstantiated.

Thereafter, on August 31, 2005, Mother filed her Verified Petition to Modify Custody, Parenting Time, and Child Support. On October 12, 2006, the trial court rendered its Special Findings of Fact and Conclusions of Law. In its detailed Order, the trial court issued the following conclusions, in pertinent part

CONCLUSIONS OF LAW

* * *

> 6. Pursuant to Indiana law, I.C. [§] 31-17-2-13, an award of joint legal custody may be made by the [c]ourt if that joint legal custody award would be in the best interests of the child.
>
> 7. That the [c]ourt has considered those factors identified [in] I.C. [§] 31-17-2-15 and believes that a joint legal custody award is appropriate, but not the physical custody and primary residence of [A.B.] which shall remain in [the Grandparents].
>
> 8. That the [c]ourt modifies the existing Orders of the [c]ourt and awards joint legal custody to the [Mother] and to the [Grandparents] upon conditions that these parties, without disruption of [A.B.'s] best interests, conduct themselves as partners in [A.B.'s] welfare.
>
> 9. That the [c]ourt concludes that a joint legal custodial arrangement between the [Mother] and the [Grandparents] serves the best interests of the child rather than placing sole legal custody with either the [Mother] or the

[Grandparents], provided that these parties will maintain primary residence of [A.B.] in the home of the [Grandparents].

10. That removing [A.B.] totally from the daily care of the [Grandparents] would be harmful and not in [A.B.'s] best interests at this time. That [A.B.'s] best interests substantially and significantly would be served by a joint custodial arrangement between the [Mother] and the [Grandparents].

11. That the [c]ourt concludes that any transfer of physical custody and residence of [A.B.] from the [Grandparents] to [Mother] should be done in a gradual manner for the benefit of [A.B.]. That currently, the [c]ourt concludes that a sharing of the custodial responsibilities between the [Mother] and the [Grandparents] would be most advantageous and most beneficial for [A.B.].

12. That the [Mother] voluntarily relinquished custody of [A.B.] to the [Grandparents]. That [A.B.] turned four (4) years of age on February 25, 200[6]. That since he was three (3) months old he has resided with the [Grandparents] on a continuous basis and his affections are so interwoven with the [Grandparents] that totally severing the custodial care of the [Grandparents] would seriously mar and endanger the future happiness of [A.B.].

13. That the [c]ourt determines that it would be in the best interests of [A.B.] to continue with his preschool at Zanesville United Methodist Church on Tuesdays, Wednesdays, and Thursdays.

14. That the [Grandparents] shall have primary custody of [A.B.].

15. That the [c]ourt orders the parties to follow the Indiana Parenting Time Guidelines or as otherwise agreed upon by the [Mother] and the [Grandparents]. Furthermore, the [c]ourt orders the parties to communicate with one another to provide for the legal, medical, and educational needs of [A.B.] and, specifically for the preschool attendance of A.B. at Zanesville United Methodist Church on Tuesdays, Wednesdays, and Thursdays.

16. That the [c]ourt calculates a Child Support Obligation Worksheet for both [James] and [Mother] and, effective August 31, 2005, determines an appropriate amount of support to be paid by [James] is $38.00 per week current support. That the [c]ourt determines an appropriate amount of support to be paid by [Mother] to be $41.00 per week current support. That any support arrearage shall be paid by [James] and [Mother] at the rate of $10.00 per week until the arrearage is paid in full. That said support shall

> be paid to the [Grandparents]. The Child Support Obligation Worksheet is ordered filed of Record, dated October 12, 2006.
>
> 17. That [A.B.] shall continue on the Hoosier Healthwise program or as health insurance is available otherwise through the employment of [Mother].

(Appellant's App. pp. 7-10).

Mother now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

In general, we review custody modifications for an abuse of discretion, with a preference for granting latitude and deference to our trial courts in family law matters. *Leisure v. Wheeler*, 828 N.E.2d 409, 414 (Ind. Ct. App. 2005) (quoting *Apter v. Ross*, 781 N.E.2d 744, 757 (Ind. Ct. App. 2003), *trans. denied*). We will not reverse unless the trial court's decision is against the logic and effect of the facts and circumstances before it or the reasonable inferences drawn therefrom. *Truelove v. Truelove*, 855 N.E.2d 311, 314 (Ind. Ct. App. 2006).

Additionally, Mother is appealing from a decision in which the trial court entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52. Thus, we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. *Staresnick v. Staresnick*, 830 N.E.2d 127, 131 (Ind. Ct. App. 2005), *reh'g denied*. The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Id*. A judgment is clearly erroneous when a review of the record leaves

us with a firm conviction that a mistake has been made. *Id*. We neither reweigh the evidence or assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. *Id.*

II. *Modification To Joint Legal Custody*

Initially, we note that there is an important and strong presumption that a child's best interests are served by placement in the custody of the natural parent. *Allen v. Proksch*, 832 N.E.2d 1080, 1099 (Ind. Ct. App. 2005). The presumption provides a measure of protection for the rights of the natural parent, but more critically, it embodies innumerable social, psychological, cultural, and biological considerations that significantly benefit the child and serve the child's best interests. *Id*.

Ordinarily, a trial court may not modify a child custody order unless (1) the modification is in the best interests of the child, and (2) there is a substantial change in one or more of the facts a court may consider under I.C. § 31-17-2-8. *See* I.C. §31-17-2-21; *Leisure,* 828 N.E.2d at 414. However, where a natural parent seeks custody over a third party, as in the case before us, the third party must first rebut the parental presumption with "evidence establishing the natural parent's unfitness or acquiescence, or [by] demonstrating that a strong emotional bond has formed between the child and the third party." *In re Paternity of Z.T.H.*, 839 N.E.2d 246, 252 (Ind. Ct. App. 2005) (quoting *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002)). If the third party is able to rebut the parental presumption with clear and convincing evidence, the third party is then essentially in the same position as any custodial parent objecting to the modification of custody. *Z.T.H.*, 839 N.E.2d at 252. In other words, the third party is

placed on a level playing field with the parent, and the parent seeking to modify custody must establish the statutory requirements for modification by showing that modification is in the child's best interests and that there has been a substantial change in one or more of the enumerated factors. *Id*. at 252-53.

A. *Parental Presumption*

The first step of this two-step process, requiring a third party to overcome the parental presumption, reflects the traditional analysis for parent-third party custody disputes, and was specifically laid out in *Hendrickson v. Binkley*, 316 N.E.2d 376 (Ind. Ct. App. 1974), *cert. denied,* 423 U.S. 868 (1975). Under *Hendrickson*, the third party seeking custody must demonstrate parental unfitness, long acquiescence in the child or children living with the third party, or voluntary relinquishment of custody to a third party "such that the affections of the child and the third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child." *Francies v. Francies*, 759 N.E.2d 1106, 1113 (Ind. Ct. App. 2001), *reh'g denied, trans. denied*.

Mother now raises a mere general assertion that "[s]ince the [Grandparents] failed to rebut the parental presumption, the court could not have reached the 'general best interests' analysis," without providing this court with any specific evidence or analysis of the purported failed rebuttal. (Appellant's Br. p. 15). On the other hand, the Grandparents skip the first step altogether and immediately focus their analysis on the statutory requirements for modification.

However, the record is clear that A.B. has been in the care of his Grandparents since he was three months old. During testimony, Mother admitted that Grandparents are completely involved in A.B.'s life, anticipating and meeting all of his needs on a daily basis. More importantly, in their settlement agreement leading to their Decree of Dissolution, A.B.'s parents voluntarily relinquished and awarded sole custody to the Grandparents. As the evidence clearly shows that there has been a long acquiescence in A.B. living with his Grandparents and custody was voluntarily relinquished, we find that the Grandparents have overcome the parental presumption. *See Z.T.H.*, 839 N.E.2d at 252; *Francies*, 759 N.E.2d at 1113.

Accordingly, by placing the Grandparents on a level playing field as Mother, the burden shifts to Mother to demonstrate that it is in the best interests of A.B. to be in her custody and that a substantial change in one or more of the factors under I.C. § 31-17-2-8 has occurred. *See Z.T.H.*, 839 N.E.2d at 252-53.

B. *Modification of Custody*

Indiana Code section 31-17-2-21, governing the modification of a custody order, stipulates that the "[c]ourt may not modify a custody order unless: (1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under section 8 . . . of this chapter." The factors listed in I.C. § 31-17-2-8 are the following:

> (1) The age and sex of the child.
> (2) The wishes of the child's parent or parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> (4) The interaction and interrelationship of the child with:

(A) the child's parent or parents;
(B) the child's sibling;
(C) any other person who may significantly affect the child's best interests.

(5) The child's adjustment to the child's:
(A) home;
(B) school; and
(C) community.

(6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic or family violence by either parent.

(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Testimony deduced at trial shows that, unlike in the past, Mother has now acquired a home of her own and appears to be gainfully employed. All parties testified that Mother maintained a bond with her son through weekly visits and can be considered a good parent. Due to her changed personal circumstances, Mother filed the instant petition for custody modification, as she now believes to be able to provide for A.B. on a daily basis. Thus, as there clearly is a substantial change in Mother's material conditions and wishes, the trial court appropriately could modify the child custody arrangement in effect.

However, mindful of A.B.'s best interests, the trial court modified legal custody from A.B.'s Grandparents to joint legal custody shared with Mother with physical custody to remain with the Grandparents. Nevertheless, Mother disputes the award of joint legal custody and requests this court to reverse the trial court's decision and to award her sole custody.

In accordance with I.C. § 31-17-2-15, upon entering an award of joint legal custody, the trial court shall consider

> it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody. The court shall also consider:
>
> (1) the fitness and suitability of each of the persons awarded joint custody;
> (2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare;
> (3) the wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age; and
> (4) whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;
> (5) whether the persons awarded joint custody:
>
> (A) live in close proximity to each other; and
> (B) plan to continue to do so; and
>
> (6) the nature of the physical and emotional environment in the home of each of the persons awarded joint custody.

In *Walker v. Walker*, 539 N.E.2d 509, 513 (Ind. Ct. App. 1989), we affirmed an award of joint legal custody, noting that the parents demonstrated a willingness and ability to communicate and cooperate in advancing the child's welfare. We held:

> [N]owhere in the record is evidence of fundamental differences in child rearing philosophies, religious beliefs, or lifestyles. Nowhere is evidence that child rearing became a battleground. . . . [N]o evidence indicates a major obstruction in the willingness or ability of [the parents] to communicate and cooperate in advancing [the child's] welfare. On the contrary, they have demonstrated an ability to put aside their own differences in order to cooperate for [the child's] best interest.

Id. at 512-13.

Here, the record is devoid of any indications that fundamental differences in child rearing philosophies, religious beliefs, or lifestyles appear to exist between the parties. To the contrary, the evidence presented to the court reflects that both parties communicate with respect to A.B.'s needs. Specifically, both Mother and Grandparents testified that they agreed on a visitation schedule different and more involved than the

one established by the trial court. They assured the court that they are able to communicate regarding A.B.'s upbringing and educational needs. The Grandparents enrolled A.B. in a preschool program at their church, the Zanesville United Methodist Church, to which Mother voiced no objection. While in preschool and with the support of his Grandparents, A.B. has overcome certain behavioral problems. Furthermore, A.B. has developed a close relationship with his aunt and his cousin, who reside next door to his Grandparents. A.B. and his older cousin play together on a daily basis. By remaining in his Grandparents' care, A.B. would have the ability to maintain his friendships and acquaintances both at school and at home.

Based on the evidence presented, we agree with the trial court's decision to gradually increase Mother's involvement in A.B.'s life by instituting joint legal custody. At the moment, A.B. is only familiar with his Grandparents' environment: he was effectively raised by them since three months of age and has established a close emotional bond with them resulting in a deep mutual affection and feeling of safety. Immediately and without any warning uprooting A.B. from what he considers to be his home would not be in his best interests. Mindful of this, the trial court formulated a beneficial custodial arrangement for A.B. by allowing him to continue to build on the stable foundation of his relationship with his Grandparents, while at the same time expanding his relationship with his Mother. Consequently, we find that the evidence supports the trial court's findings and the findings support its judgment. *See Staresnick*, 830 N.E.2d at 131. As such, we decline to set aside the trial court's Order.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly granted joint legal custody of A.B. to Mother and the Grandparents, with primary physical custody retained by the Grandparents.

Affirmed.

NAJAM, J., and BARNES, J., concur.